Supreme Court, U.S.
FILED
011409 MAR 19 2002
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ENRIQUE AVALOS-BARRIGA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

EZEKIEL E. CORTEZ
1010 Second Avenue, Suite 1850
San Diego, California 92101
Telephone: (619) 237-0309

Attorney of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

50pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT IMPERMISSIBLY AMENDED A STATUTE WHEN IT INSTRUCTED THE JURY ON ONE OF THE ELEMENTS OF TITLE 21 U.S.C. § 848(a)(2)(A), BY REPLACING THE EXPLICIT "IN CONCERT WITH" STATUTORY LANGUAGE WITH ITS OWN IMPROVISED PHRASE – "TOGETHER WITH"?

II. WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY THAT IT HAD TO UNANIMOUSLY AGREE ON THE *SAME* THREE VIOLATIONS CONSTITUTING THE "CONTINUING SERIES OF VIOLATIONS" REQUIREMENT OF § 848(a)(2)?

III. WHETHER THE APPELLATE COURT SANCTIONED A VIOLATION OF THE ESTABLISHED RULES FOR TITLE 28 U.S.C. § 2255 PROCEEDINGS BY ADOPTING THE DISTRICT COURT'S DIVINING THAT TRIAL COUNSEL HAD A "TRIAL STRATEGY" WHERE THE RECORD YIELDS ABSOLUTELY NO SUCH EVIDENCE?

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 2

REASONS FOR ALLOWANCE OF THE WRIT 5

I. THE TRIAL COURT IMPERMISSIBLY AMENDED A STATUTE WHEN IT INSTRUCTED THE JURY ON ONE OF THE ELEMENTS OF TITLE 21 U.S.C. § 848(a)(2)(A), BY REPLACING THE EXPLICIT "IN CONCERT WITH" STATUTORY LANGUAGE WITH ITS OWN IMPROVISED PHRASE – "TOGETHER WITH" 5

II. THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY THAT IT HAD TO UNANIMOUSLY AGREE ON THE *SAME* THREE VIOLATIONS CONSTITUTING THE "CONTINUING SERIES OF VIOLATIONS" REQUIREMENT OF § 848(a)(2) 11

III. THE APPELLATE COURT SANCTIONED A VIOLATION OF THE ESTABLISHED RULES FOR TITLE 28 U.S.C. § 2255 PROCEEDINGS BY ADOPTING THE DISTRICT COURT'S DIVINING THAT TRIAL COUNSEL HAD A "TRIAL STRATEGY" WHERE THE RECORD YIELDS ABSOLUTELY NO SUCH EVIDENCE 13

CONCLUSION 15

APPENDIX A, Memorandum Opinion of Appellate Court issued on October 16, 2001 .....App. 1

TABLE OF CONTENTS – Continued

Page

APPENDIX B, District Court's Order Denying Petitioner's Motion Under 28 U.S.C. § 2255, issued on July 6, 2000 ..... App. 5

APPENDIX C, Appellate Court's Order Denying Petition For Rehearing and Suggestion for Rehearing *En Banc*, Issued December 21, 2001 ..... App. 22

APPENDIX D, Relevant Portion of Title 21 U.S.C. § 848 ..... App. 23

APPENDIX E, Jury Instructions At Issue October 9, 1997 ..... App. 25

TABLE OF AUTHORITIES

Page

CASES

Chapman v. California, 386 U.S. 18 (1967) 9

Griffin v. United States, 502 U.S. 46 (1991) 7

In Re Winship, 397 U.S. 358 (1970) 7

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1950) 10

Keating v. Hood, 191 F.3d 1053 (9th Cir. 1999)..... 7

McNally v. United States, 483 U.S. 350 (1987) 8

Neder v. United States, 527 U.S. 1 (1999)..... 9

Richardson v. United States, 526 U.S. 813 (1999) 4

Rutledge v. United States, 517 U.S. 292 (1996) 3, 9

Sandstrom v. Montana, 442 U.S. 510 (1979)..... 7

United States v. Estrada-Macias, 218 F.3d 1064 (9th Cir. 2000) 8

United States v. Pinkney, 15 F.3d 825 (9th Cir 1994)..... 8

United States v. Sanchez-Mata, 925 F.2d 1166 (9th Cir. 1991) 8

STATUTES

21 U.S.C. § 848..... *passim*

28 U.S.C. §§ 1291 and 2253(a)..... 1

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2255..... 1, 3, 13

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

Fifth Amendment ..... *passim*

Sixth Amendment ..... *passim*

DICTIONARIES

Black's Law Dictionary, Fifth Edition (1979) 7, 9

PETITION FOR WRIT OF CERTIORARI

Petitioner, Enrique Avalos-Barriga, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 21, 2001.

OPINIONS BELOW

The Memorandum Opinion of the Ninth Circuit Court of Appeals affirming Petitioner's conviction was filed on October 16, 2001 and was unpublished; a copy of this Opinion is included in Appendix A. The appellate court's Memorandum Opinion affirmed the district court's order entered on July 6, 2000 denying Petitioner's motion to set aside his conviction and sentence because of ineffective assistance of counsel under 28 U.S.C. § 2255. The district court's Order is included in Appendix B. On December 21, 2001 the Court issued an Order denying Petitioner's request for Rehearing and his petition for rehearing *en banc*. This Order is included as Appendix B.

JURISDICTION

On October 16, 2001 the Ninth Circuit Court of Appeals entered its opinion affirming the district court's denial of his Title 28 U.S.C. § 2255 motion to set aside his conviction. The appellate court had jurisdiction pursuant to Title 28 U.S.C. §§ 1291 and 2253(a). See, Appendix A. Then, on December 21, 2001 the Court of Appeals denied

a Petition for Rehearing and rejected a Suggestion for Rehearing En Banc. See, Appendix B. Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment V:

No person shall . . . be deprived of life, liberty or property without due process of law. . . .

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . and to have the Assistance of Counsel for his defense. . . .

STATUTES INVOLVED IN THIS CASE

The text of Title 21 U.S.C. § 848(a) and (c)(2)(A) is reproduced in Appendix D herein.

STATEMENT OF THE CASE

1. Petitioner was sentenced to life in prison for his conviction for, *inter alia*, conducting a Continuing Criminal Enterprise (CCE) in violation of 21 U.S.C. § 848. He thereafter challenged his conviction and sentence in his *habeas corpus* motion alleging ineffective assistance of counsel in numerous areas. See, Appendix A, pages App. 1-2; and, Appendix B, pages App. 5-6.

One of the critical issues where Petitioner alleged ineffective assistance was in trial counsel's failure to object to the jury instructions on the CCE charge. In instructing the jury, the trial court ignored, *inter alia*, the explicit wording of the statute – the "in concert with" requirement at § 848(a)(2)(A) – and replaced it with its own phrase "together with." See, Appendix A, page App. 4.

However, the district court's Order denying Petitioner's motion under Title 28 U.S.C. § 2255 alleging ineffective assistance of counsel in this area, failed to consider the jury instructions issues presented by Petitioner because it concluded that no prejudice could be established because of the concurrent sentence doctrine. Petitioner was also convicted of conspiracy to possess cocaine with intent to distribute and received a concurrent life sentence; regrettably, the district court failed to note that this conviction and concurrent sentence were vacated by the appellate court pursuant to *Rutledge v. United States*, 517 U.S. 292 (1996). See, Appendix B, page App. 14.

2. In his *habeas* motion, Petitioner also raised the jury instruction defect connected to the "continuing series of violations" element of § 848(a)(2). This issue was also not considered by the district court because of the concurrent sentence doctrine. See, Appendix B, page App. 14.

On appeal, he argued that the jury instructions only required a unanimous finding that Petitioner committed three or more felony drug violations, whether or not they were charged or prosecuted as a violation of the federal narcotics laws.

Although the court instructed the jury that they must unanimously agree on the three offenses constituting the series of violations, that was not the functional equivalent of this Court's holding in *Richardson v. United States*, 526 U.S. 813, 815-16 (1999) – that the jury is required to unanimously agree on the *same* three offenses that make up the continuing series of CCE predicate violations. Here again, the appellate court simply held – "The instructions regarding the unanimity requirement and the number of people involved appeared consistent with the statutory elements." See, Appendix A, page App. 4. *Richardson* was never even mentioned by the appellate court.

3. Petitioner also argued that he suffered from ineffective assistance of counsel in various other areas of his jury trial. See, Appendix B, page App. 5-6. An evidentiary hearing was held on other contested issues wherein Petitioner's trial counsel testified for the government. Appendix B, page App. 6 and Note 1. At the hearing, counsel was never asked by the government or the court about any tactical or strategic objectives he may have had at trial to explain the various acts described by Petitioner as ineffective. Therefore, the record bears no evidence at all that counsel had any specific strategy or tactic in doing the actions challenged by Petitioner. The district court simply noted in its Order that "The trial and sentencing errors raised by [Petitioner] have been considered on the papers." Appendix B, page App. 6, Note 1.

The appellate court held, without a basis on the record, that – "Trial counsel's decisions during trial were reasonable, **given his trial strategy** and evidence presented by the Government." See, Appendix A, page App. 3 (emphasis added). As noted above, there was absolutely

no evidence on the record what, if any, "trial strategy" counsel employed.

REASONS FOR GRANTING THIS PETITION

I.

THE TRIAL COURT IMPERMISSIBLY AMENDED A STATUTE WHEN IT INSTRUCTED THE JURY ON ONE OF THE ELEMENTS OF TITLE 21 U.S.C. § 848(a)(2)(A), BY REPLACING THE EXPLICIT "IN CONCERT WITH" STATUTORY LANGUAGE WITH ITS OWN IMPROVISED PHRASE – "TOGETHER WITH."

This novel Continuing Criminal Enterprise (CCE) issue arises from the trial court's instruction to the jury regarding one of the elements of the statute – the "**in concert with** five or more" element required by Title 21 U.S.C. § 848(a)(2)(A). (Emphasis added). Here, instead of instructing the jury on the elements of § 848, by faithfully reading the explicit language of the statute, the trial court inexplicably created its own phrase – "together with" – as a substitute. In so doing, the trial court radically departed from the acceptable judicial procedure.

On appeal, the Ninth Circuit Court of Appeals remarkably opined – "The language 'together with' **is not so different** from 'in concert with' as to make the instructions noticeably incorrect." Appendix A, Memorandum Order at App. 3 (emphasis added).

Title 21 U.S.C. § 848 provides, in relevant part:

> For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –
>
> (A) Which are undertaken **in concert with** five or more other persons with respect to whom such person occupies a position of organizer, a supervising position, or any other position of management, and
>
> (B) From which such a person obtains substantial income or resources.

(Emphasis added). See, *Richardson v. United States*, 526 U.S. 813, 815-16 (1999).

In *Richardson*, this Court noted – "Federal crimes are made up of factual elements, which are ordinarily listed in the statute that defines the crime." See, *Richardson* at 817. Here, in instructing the jury on the elements of the offence at issue, the trial court replaced, without objection from counsel, the phrase "in concert with" with its own variation – "together with." The appellate court reviewing this issue stated "The language 'together with' **is not so different** from 'in concert with' as to make the instructions noticeably incorrect." Appendix A, Memorandum Order at App. 3 (emphasis added).

What the appellate court missed here was that the district court was materially altering the very wording of the statute and diminishing the burden of proof upon the government. The usage and legal meanings of the two phrases are indeed materially different: "in concert with" includes a knowing, meeting-of-the-minds conspiratorial participation; whereas, "together with" simply describes physical presence without any conspiratorial requirement.

Black's Law Dictionary defines the word "Concert" with the following example: "A person is deemed to act in concert when he acts with another to bring about some **preconceived** result." Black's Law Dictionary, Fifth Edition (1979) (emphasis added). "Concerted Action" is further defined as "Action that has been **planned, arranged, adjusted, agreed on and settled between parties** ***acting together*** pursuant to some design or scheme." (Emphasis added). The definition of "Concerted Action" in Black's is instructive because it just happens to contain the lesser-included and obviously incomplete "acting together" language unfortunately injected here by the district court. Black's defines "Together" as "In union with, along with"; quite less descriptive than the other two definitions!

Therefore, the jury was left on its own to determine what "together with" meant and was impermissibly allowed to find guilt on the CCE count with a lesser burden than that constitutionally required. *Griffin v. United States*, 502 U.S. 46 (1991); *Keating v. Hood*, 191 F.3d 1053 (9th Cir. 1999); *Sandstrom v. Montana*, 442 U.S. 510 (1979); and *In Re Winship*, 397 U.S. 358 (1970).

A passenger in a car driven across the international border by a driver who knows that drugs are secreted in the car may indeed be in the car "together with" the driver but is not necessarily transporting the secreted drugs "in concert with" the driver. The Ninth Circuit has already held that mere presence at the scene, or while "together with" one committing a crime, is insufficient for conviction. See, *United States v. Estrada-Macias*, 218 F.3d 1064 (9th Cir. 2000) (mere presence at the site and even knowledge that drug manufacturing was taking place are insufficient to convict for conspiracy to manufacture methamphetamine); *United States v. Pinkney*, 15 F.3d 825, 827 (9th Cir 1994) (mere presence is insufficient for conspiracy); *United States v. Sanchez-Mata*, 925 F.2d 1166, 1168 (9th Cir. 1991) (a person's mere knowledge of drugs and mere presence at the scene was insufficient for a conspiracy).

In all of these "mere presence" cases, it can be said that the defendants were convicted because each defendant was "together with" the others who committed the respective crimes in each case. But it can easily be said that the appellate court reversed the convictions because they were not acting "in concert with" the principals in each case. Why should the improvised phrase "together with" be allowed in this case risking a jury's conviction on nothing more than a "mere presence" standard of proof?

The appellate court considering this judicial statutory redrafting issue failed to appreciate that what the district court was doing here was unadulterated *ad hoc* statutory drafting and changing legislative language expressly disapproved by this Court in *McNally v. United States*, 483

U.S. 350 (1987). The "in concert with" statutory language was meant to be a phrase of art and not merely a fungible suggestion. The phrase itself has a specific legal definition as can be noted from Black's Law Dictionary. Had it been intended for the phrase to be fungible, the statute would have included the phrase -"or any such language that the trial court deems appropriate"! Judges are not to be allowed to improvise on carefully and laboriously drafted statutes by choosing whatever language, at the time, comes close enough to it.

The improvised jury instructions given by the trial court also required only a unanimous finding that Avalos committed three or more violations of the federal narcotics law. The jury was not required to agree that three offenses were committed while acting "in concert with five or more other persons."

The omission of the "in concert" element in the court's CCE charge, not only constructively amended the indictment, it also failed to require a unanimous verdict of guilty beyond a reasonable doubt, as to each of the essential elements of the § 848 (CCE) violation, and thus, rendered the instructions constitutionally deficient.

Because the appellate court never reached the issue actually raised in this case, it never applied a prejudice analysis on this specific issue required by this Court's rulings in *Chapman v. California*, 386 U.S. 18 (1967), *Neder v. United States*, 527 U.S. 1, 27-53 (1999) and *Rutledge v. United States*, 517 U.S. 929 (1996).

The clear appearance of this case is that, in this country, a court, by "mere will" and fiat, inexplicably decide to ignore the specific language and words of art

required by a duly enacted statute to replace them with its own determination of what "satisfies [the court's] private conscience" at that time. See, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171 (1950). And, that an appellate court, whose duty is to enforce the laws and oversee the actions of lower courts, has allowed statute drafting by dismissing a defendant's claim of error as a mere technicality. Far more is involved in the case at bar and the far larger picture should be regarded.

The wisdom of Justice Frankfurter eloquently articulated in different but surreally similar times (October term 1950) may now be trampled upon in the name of expediency. In *McGrath*, during the McCarthy shame of our country, Justice Frankfurter also stated:

> Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That **a conclusion satisfies one's private conscience** does not attest its reliability. The **validity and moral authority** of a conclusion largely depend **on the mode by which it was reached**. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, **so important to a popular government**, that justice has been done.

McGrath, at 171-172 (emphasis added). The "mode by which" Petitioner's conviction "was reached" – the belief that the statutory language required here was somehow

unnecessary – *inter alia*, leaves in doubt the "validity and moral authority" of the conclusion reached here.

II.

THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY THAT IT HAD TO UNANIMOUSLY AGREE ON THE *SAME* THREE VIOLATIONS CONSTITUTING THE "CONTINUING SERIES OF VIOLATIONS" REQUIREMENT OF § 848(a)(2).

In *Richardson*, this court cautioned as follows:

> The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion **of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, or did not, do**. The second consideration significantly aggravates the risk (present at least to a small degree **whenever multiple means are at issue**) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke, there must be fire.

Richardson at 819 (emphasis added). This passage from *Richardson* is instructive in the case at bar considering that the district court also eliminated the "in concert" requirement.

Here, for example, the government incorporated into Count 2, (the CCE count) the conspiracy charge in Count 1, and further alleged: "Enrique Avalos-Barriga did

knowingly and intentionally engage in a continuing criminal enterprise by violating various provisions of the Controlled Substance Act (Title 21, United States Code, Section 841, 846, 952, 960 and 963) as alleged in overt acts 1-79 of Count 1 of this indictment, which offenses were part of a continuing series of violations of the Controlled Substance Act."

To prove that Petitioner committed the continuing series of predicate violations, the government did not merely present the jury with three eligible predicate acts, but instead presented evidence of 79 overt acts allowing the jury to pick those offenses it felt met the proper definition – despite the fact that Petitioner was not alleged to be involved in over 50% of those violations and despite the fact that many of the alleged 79 overt acts, alleged money wire transfers and traveling in interstate and foreign commerce to distribute drug proceeds.

Therefore, the trial court's failure to instruct the jury that they had to unanimously agree on the *same* three offenses constituting the continuing series is contrary to the holding in *Richardson*, and would have allowed Petitioner to be convicted of the CCE offense, for example, if six jurors had unanimously agreed that overt acts 1-3 were the continuing series of violations and the other six jurors unanimously agreeing that acts 4-7 represented the continuing series.

Furthermore, where the jury is presented with offenses that do not qualify as a predicate offense, to support the continuing series requirement, as a matter of law the jury needed to be instructed on this point.

Here, the jury was allowed to consider 79 overt acts the government had alleged as the continuing series of CCE predicate offense to prove the continuing series for the CCE violation. Of the 79 overt acts, Petitioner was only named in 34 of them. 18 of those overt acts alleged that he traveled in interstate or foreign commerce to deliver drug proceeds, or wire transfers or drug proceeds. Those offenses do not qualify as eligible underlying offenses for CCE.

In the case at bar, out of the 79 alleged continuing series of CCE predicate violations the jury was allowed to consider, 67 do not apply. Therefore, the trial court's failure to instruct the jury with respect to which three specific violations, and that they must unanimously agree about which specific "violations" made-up that "continuing series," was reversible error.

III.

WHETHER THE APPELLATE COURT SANCTIONED A VIOLATION OF THE ESTABLISHED RULES FOR TITLE 28 U.S.C. § 2255 PROCEEDINGS BY ADOPTING THE DISTRICT COURT'S DIVINING THAT TRIAL COUNSEL HAD A "TRIAL STRATEGY" WHERE THE RECORD YIELDS ABSOLUTELY NO SUCH EVIDENCE.

The Ninth Circuit here, in the face of a barren record on the point at issue in this Title 28 U.S.C. § 2255 ineffective assistance case, simply opines – "Trial counsel's decisions during trial were reasonable, **given his trial strategy** and evidence presented by the Government." Appendix A, page App. 3 (emphasis added). Unfortunately, the record is absolutely devoid of any evidence

that trial counsel had any "trial strategy" at all. In this respect, review is essential because the appellate court has sanctioned a significant departure from accepted and usual course of judicial proceedings.

Similarly, the appellate court concluded – "Trial counsel's **strategy concerning how to challenge the Government's case** was also not deficient." Appendix A, page App. 3 (emphasis added). The appellate goes on to merely articulate, without the facts in the actual record, that trial counsel's "failure to object to the Government's" false claims that Petitioner, and not "Chapo" Guzman as alleged in the indictment, was the "kingpin" here, counsel's total failure to impeach a critical non-informant witness with available impeaching material, and other shortcomings by trial counsel were simply "reasonable."

The finding, out of whole cloth, by the appellate court that trial counsel worked from a "trial strategy" is a significant departure from the accepted and usual course of judicial proceedings. The proper remedy should have been to remand for a hearing on whether such facts could be determined at the district court level where trial counsel could be summoned again to testify. Whether or not counsel acted with a certain "trial strategy" or not is a critical fact never established here. This Petition should be granted because the appellate court has deviated from accepted practice to such an extent as to make up facts to deny Petitioner meaningful appellate review.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

EZEKIEL E. CORTEZ
Attorney for Petitioner
1010 Second Avenue, Suite 1850
San Diego, California 92101
Telephone: (619) 237-0309

Dated: March 19, 2002

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ENRIQUE AVALOS-BARRIGA, aka, Flaccco [sic]; Jose Bautista; Don Vincente; Don Chepe; El Medico; El Doctor; Juan Jose Robles, Defendant-Appellant.	No. 00-56999 D.C. No. CV-99-01686-BTM CR-95-00973-BTM MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Barry T. Moskowitz, District Judge, Presiding

Argued and Submitted September 14, 2001
Pasadena, California

(Filed Oct. 16, 2001)

Before: B. FLETCHER, T.G. NELSON, and BERZON, Circuit Judges.

Enrique Avalos-Barriga appeals the district court's order denying his petition for habeas corpus filed under 28 U.S.C. § 2255. Specifically, Avalos-Barriga challenges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

the district court's dismissal of his claims regarding (1) ineffective assistance of counsel at various stages of the proceeding and (2) denial of counsel of his choice. This court has jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253(a). We affirm.

The only issue this court will consider is the claim of ineffective assistance of counsel at trial. The other claims were not included in the district court's certificate of appealability (COA), and Avalos-Barriga did not follow the proper procedures to broaden that COA. Under 28 U.S.C. § 2253(c)(3), a court of appeals has jurisdiction to hear only issues that have been certified in a COA. Under Circuit Rule 22-1(d), a party must file a motion to broaden a COA within thirty-five days of the district court's grant of the COA. Rule 22-1 was in effect when the district court granted the COA as to one issue, but Avalos-Barriga did not follow its procedures. Therefore, we may not consider the claims not included in the original COA.[1]

Avalos-Barriga did not prove that his counsel rendered ineffective assistance at trial. In assessing claims of ineffective assistance of counsel, this circuit follows the two-prong test of *Strickland v. Washington*:[2] A defendant must show deficient performance by counsel that resulted in prejudice. The record establishes that Avalos-Barriga can prove neither prong.

---

[1] *See United States v. Christakis*, 238 F.3d 1164, 1168 n.5 (9th Cir. 2001) (because petitioner failed to file motion for broader certification under Rule 22-1(d), appeal was confined to the sole issue within the original COA).

[2] 466 U.S. 668 (1984).

Trial counsel's decisions during trial were reasonable, given his trial strategy and the evidence presented by the Government.[3] Counsel's decision not to try to introduce certain documents prepared by Mexican judges was reasonable. It is unlikely that the documents would have been admitted on their merits because they contained inadmissable hearsay, and their impeachment value was minimal.

Trial counsel's strategy concerning how to challenge the Government's case was also not deficient. His failure to object to the Government's opening argument was reasonable. There was nothing egregious about the Government referring to Avalos-Barriga as the "Kingpin" or "leader" of the drug ring, and lawyers often choose not to object during opening argument. Counsel's method of impeachment was reasonable as well. He attempted to discredit the Government's key witnesses by questioning them about the money and benefits they and their families received in exchange for testifying. His choice in his closing argument to concede Avalos-Barriga's supervision of two individuals was also reasonable because of the amount of evidence linking him to those individuals. There is nothing objectively unreasonable about any of these decisions.

Last, counsel's failure to object to the jury instructions was not unreasonable. The language "together with" is not so different from "in concert with" as to

---

[3] *Id.* at 689 (to be deficient, counsel's actions must be objectively unreasonable, with a strong presumption that conduct normally falls within the wide range of reasonable professional assistance).

make the instructions noticeably incorrect. The instructions regarding the unanimity requirement and the number of people involved appeared consistent with the statutory elements. The jury instructions for the criminal enterprise charge came from the Ninth Circuit pattern jury instructions, which both attorneys agreed to use. Relying on that pattern instruction was not unreasonable.

Even assuming there was some deficient conduct, no prejudice resulted. The Government offered ample evidence of guilt, including testimony by witnesses who were former members of the drug ring, numerous wiretapped telephone conversations, and other seizures of drugs linked to Avalos-Barriga. The jury would almost certainly have found guilt even without any deficient conduct.[4]

Because Avalos-Barriga has failed to show that his attorney's actions were unreasonable and that they resulted in prejudice, we agree with the district court that there was no ineffective assistance of counsel at trial. AFFIRMED.

---

[4] *Id.* at 694 (to be prejudicial, there must be a reasonable probability that, but for counsel's conduct, the result of the trial would have been different).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. ENRIQUE AVALOS-BARRIGA, Defendant.	CIV. NO. 99 CV 1686 BTM CRIM. NO. 95 CR 973 BTM **ORDER DENYING § 2255 PETITION TO VACATE DEFENDANT'S CONVICTION AND SENTENCE AND GRANTING IN PART AND DENYING IN PART CERTIFICATE OF APPEALABILITY** (Filed Jul. 6, 2000)

On October 10, 1996, defendant Enrique Avalos-Barriga ("Avalos-Barriga") was convicted of conspiracy to posses cocaine with intent to distribute and conducting a career criminal enterprise through his involvement in a Mexican drug trafficking ring. He was sentenced to life imprisonment. Avalos-Barriga challenges his conviction and sentence under 28 U.S.C. § 2255, alleging that (1) his trial counsel was ineffective at various stages of the proceedings, (2) his counsel had a conflict of interest, and (3) he was denied counsel of his choice. For the reasons expressed below. Avalos-Barriga's petition is DENIED.

BACKGROUND

The complex factual background of this case was developed during pre-trial, trial, and post-trial proceedings. Further, the issues on collateral review have been briefed comprehensively by counsel. The Court conducted an evidentiary hearing on May 25, 2000, at which time Jan Edward Ronis ("Ronis"), Avalos-Barriga's trial counsel, was sworn and testified, and evidence was admitted.[1] At the Court's request, counsel for petitioner and respondent submitted supplemental briefs, which the Court has reviewed in consideration of this Order. Because significant time and judicial resources have already been expended in developing and presenting the facts of this case, the Court will reiterate facts only when necessary to resolution of the issues on review.

DISCUSSION

I. Ineffective Assistance of Counsel

Avalos-Barriga claims that his trial counsel, Ronis, was ineffective at various stages of the proceedings. In the seminal case of *Strickland v. Washington*, 466 U.S. 668

---

[1] At the evidentiary hearing, the Court heard testimony on Avalos-Barriga's claims that Ronis was ineffective in seeking a plea agreement, had conflicts of interest that prevented his adequate representation, and interfered with his right to counsel of his choice. *See United States v. Espinoza*, 866 F.2d 1067, 1069 (9th Cir. 1988) (concluding that a petitioner is entitled to an evidentiary hearing on a habeas petition if, accepting the truth of the allegations, the petitioner could prevail on an ineffective assistance of counsel claim). The trial and sentencing errors raised by Avalos-Barriga have been considered on the papers.

(1984), the Supreme Court set forth the standard to apply when considering claims of ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient *and* that the deficient performance prejudiced the defense. *See id.* at 687. In other words, "there [must be] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A highly deferential standard is employed when scrutinizing counsel's performance, such that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance." *Id.* at 689. To ensure that the Court reaches each allegation raised by Avalos-Barriga, it will categorize the ineffective assistance claims as follows: (A) plea agreement; (B) trial errors; (C) sentencing errors.

A. Plea agreement

Avalos-Barriga claims that he desired to enter into a plea agreement with the government but was precluded from doing so by Ronis. On the morning of trial, a co-defendant, Jose Reynoso-Gonzalez ("Reynoso-Gonzalez"), pled guilty to obtain a 151-month sentence offered by the government, leaving Avalos-Barriga as the only defendant to stand trial. Avalos-Barriga contends that when the government offered him a 20-year sentence in exchange for a guilty plea, he would have taken the offer but for Ronis dissuading him from doing so. Because he followed Ronis's allegedly deficient advice to reject the offer and he was unaware of the risks in going

to trial, Avalos-Barriga insists that he has been prejudiced by having to serve a life sentence.

During the evidentary hearing, Ronis testified that all of the remaining defendants and their attorneys came up with settlement offers on the morning of trial to present to the government. The government accepted everyone's offer, except Avalos-Barriga's 12-year offer, from which it countered with a 20-year offer. Ronis presented this offer to Avalos-Barriga and, because of the disparity between the offer and the counteroffer, Ronis sought a continuance of the trial. The trial was continued and Ronis described his conversations with Avalos-Barriga as follows:

> I presented the offer to him . . . it was so much beyond what we had offered to them initially, it was a lot to absorb in a short period of time. . . . From a lawyer's point of view, it was difficult to strongly recommend somebody take a twenty-year sentence in terms of urging it upon a client because Mr. Avalos, as I recall, is about my age, and a twenty-year prison sentence for a person who is of his age and his, as I knew then existing medical condition, was an awful lot, maybe almost a life sentence. So it is not one that you could really push on a client.
>
> Although certainly I presented it to him. We talked about all the alternatives, the options, and he made the decision. essentially the decision was, twenty years for me at my age and my health is a life sentence.

Tr. 68. Ronis further testified that early on in the case, he believed the case needed to settle, but Avalos-Barriga was

insistent that he did nothing wrong and would communicate nothing to the government. Tr. 18, 22, 28. Indeed, according to Ronis, Avalos-Barriga wanted to call a meeting with the government simply to explain that he had done nothing wrong. Tr. 22. Because of Avalos-Barriga's unwavering assertions that he was not involved in the conspiracy and would not cooperate with the government, Ronis believed that prior plea negotiations would have been fruitless.

The Court concludes that Ronis's performance, under all of the circumstances, fell within the range of reasonably effective legal counsel. After the defendants negotiated plea agreements with the government. Avalos-Barriga was the only defendant remaining to stand trial. Ronis appropriately sought a continuance, which he obtained, to discuss the government's counter-offer. Ronis presented the offer to Avalos-Barriga, who was aware that he could receive a life sentence. Even if the Court concluded that Ronis's performance in failing to further negotiate a plea agreement was deficient, Avalos-Barriga has offered no evidence to indicate that he would have taken the 20-year offer, no mater who would have brought it to his attention.

The Court notes that the cases cited by Avalos-Barriga in his papers are inapposite. Ronis did not fail to inform Avalos-Barriga of the government's plea offer. *Cf. United States v. Blaylock*, 20 F.3d 1458, 1456 (9th Cir. 1994) (holding that an attorney's failure to communicate the government's plea offer to his client constitutes unreasonable conduct under prevailing professional standards). Furthermore, Ronis explained the options available to Avalos-Barriga, who was fully aware of the

potential consequences if he proceeded to trial. *Cf. Alvernaz v. Ratelle*, 831 F.Supp. 790, 792 (S.D. Cal. 1993) (concluding that counsel's failure to advise defendant of the consequences of going to trial was unreasonable under prevailing professional norms). Although Ronis did not engage the government in ongoing plea negotiations, Ronis's actions were well within the "strategy, tactics, and styles" of defense attorneys and do not amount to deficient performance. *See e.g. Aguilar v. Alexander*, 125 F.3d 815, 821 (9th Cir. 1997) (holding that counsel's failure to aggressively pursue plea negotiations did not amount to deficient performance but was within the realm of strategy, tactics, and styles of defense attorneys).

B. Trial errors

Avalos-Barriga makes several challenges to decisions made by Ronis during trial. He claims that the effect of the following trial errors rose to ineffective assistance of counsel: (1) Ronis failed to investigate and present to the court judicial orders from Mexico that exonerated Avalos-Barriga from involvement with the 7.3 tons of cocaine; (2) Ronis failed to object to the government's opening statement, which referred to Avalos-Barriga as "the leader" and "kingpin"of the drug organization; (3) Ronis failed to present testimony that the amount stolen from the house was one million pesos rather than one million dollars; (4) Ronis conceded that two members of the conspiracy took some direction and control from Avalos-Barriga; (5) Ronis failed to challenge the government's arguments on elements other than the supervisory element of the continuing criminal enterprise charge; (6) Ronis failed to object to

several jury instructions; (7) Ronis failed to effectively impeach witnesses; (8) Ronis failed to emphasize testimony favorable to Avalos-Barriga in his closing argument; and (9) Ronis failed to make a motion to cure defects in the indictment.

Counsel's tactical decisions at trial are given great deference in ineffective assistance of counsel claims. *See Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000); *see also People of the Territory of Guam v. Santos*, 741 F.2d 1167, 1169 (9th Cir.1984) (per curiam) (holding that a tactical decision by counsel with which the defendant disagrees cannot be the basis of a claim of ineffective assistance of counsel). As such, any decision by counsel must meet only objectively reasonable standards. *See Dows*, 211 F.3d at 487.

Avalos-Barriga claims that Ronis's failure to present evidence of Mexican documents that exonerated him from involvement in the 7.3 ton cocaine seizure constitutes ineffective assistance of counsel. The documents allegedly indicate that an arrest warrant for Avalos-Barriga based on the seizure of 7.3 tons of cocaine had been denied due to insufficient evidence. Even if these documents were not admitted into evidence, Avalos-Barriga insists that they should have been used to impeach the testimony of Ali Arista-Chavez's ("Arista-Chavez"), the prosecutor from the Mexican Attorney General's Office who testified about the seizure of the 7.3 tons of cocaine and the search of the warehouse leased to Avalos-Barriga. During direct examination of Arista-Chavez, the government attempted – but was unable – to present evidence that the 7.3 tons of cocaine seized in Tecate was destined for the warehouse in Tijuana leased by Avalos-Barriga. As

Ronis falls within the purview of trial tactics and strategy. The facts of the case were complex and the trial spanned six days. Taped conversations established the amount of drugs, the series of offenses, and the income received form the transactions. It was within Ronis's discretion to focus on the arguments that a jury would find most compelling and that a jury could easily assimilate in light of the complicated testimony.

Avalos-Barriga further insists that Ronis failed to object to various elements of the jury instruction on the continuing criminal enterprise count. The court needs not reach the merits of the jury instructions, however, because Avalos-Barriga is unable to demonstrate prejudice. *See Strickland*, 465 U.S. at 697 (concluding that if no prejudice results from alleged deficiencies in performance, a court can dismiss an ineffective assistance of counsel claim without determining whether counsel's performance was deficient). Avalos-Barriga was convicted of both conspiracy to possess cocaine and a continuing criminal enterprise. Because the Honorable Leland C. Nielsen sentenced Avalos-Barriga to two life sentences, one on each count, Avalos-Barriga is unable to demonstrate prejudice even if the jury instruction was improper. For this reason, the court must deny Avalos-Barriga's claim of ineffective assistance of counsel for failure to object to the jury instructions.

Avalos-Barriga's last three challenges can be dealt with summarily. His claims that Ronis failed to effectively impeach witnesses and failed to emphasize favorable testimony during closing arguments are not supported by the facts. Indeed, Ronis's impeachment strategies and closing argument followed the same theme as his theory

at trial: Avalos-Barriga was not the main boss, and government informants were testifying against him to receive personal concessions. Avalos-Barriga's final contention that Ronis failed to make a motion to cure the indictment is likewise without merit. As the arguments focus solely on the continuing criminal enterprise count, Avalos-Barriga is unable to demonstrate prejudice even if Ronis's actions were ineffective. *See Strickland*, 466 U.S. at 697.

In sum, the Court has considered the challenges to Ronis's actions during trial, the government's opposition and reasons supporting each of Ronis's decisions, and Avalos-Barriga's traverse to the government's response. After careful examination, the Court concludes that every exception raised by Avalos-Barriga is without merit. The Court will not second-guess Ronis's decisions made during trial, all of which fall within the wide range of professionally competent assistance. *See Ainsworth v. Calderon*, 138 F.3d 787, 791 (9th Cir. 1998).

C. Sentencing errors

Avalos-Barriga insists that Ronis's failure to challenge the disparate, more lenient treatment that Reynosos-Gonzalez received at sentencing amounts to ineffective assistance of counsel. Reynosos-Gonzalez pled guilty before trial and received a 13-year sentence for his involvement in the conspiracy. Avalos-Barriga received a life sentence after trial. Both defendants were sentenced by Judge Nielsen.

Avalos-Barriga's argument must fail because it is based on the false premise that the charges against

Reynoso-Gonzalez and Avalos-Barriga were the same. Unlike Avalos-Barriga, Reynoso-Gonzalez was never charged with a continuing criminal enterprise. Indeed, Avalos-Barriga and Reynoso-Gonzalez received disparate sentences because of the government's assessment of their comparative roles, ages, and strength of the evidence. The government proceeded on a theory that Avalos-Barriga was the leader of the drug operation who gave orders to others, including Reynoso-Gonzalez. This theory is supported by the plea agreements offered to Reynoso-Gonzalez and Avalos-Barriga; Reynoso-Gonzalez was offered a plea of 13-years, which he elected to take, and Avalos-Barriga was offered a plea of 20-years, which he turned down. When Judge Nielsen sentenced Avalos-Barriga, he was intimately familiar with the facts of the case, the plea agreements, and the sentences given to the other defendants. Avalos-Barriga suffered no prejudice, and his claim for ineffective assistance of counsel in the sentencing phase fails.

II. Conflict of interest

Avalos-Barriga claims that Ronis had a conflict of interest in his representation of Sylvia Lopez-Juarez, Avalos-Barriga's common law wife, and in his partnership with Michael Pancer, counsel for Reynoso-Gonzalez. To succeed on a conflict of interest claim, Avalos-Barriga must demonstrate an actual conflict, rather than a potential or speculative conflict. *See United States v. Allen*, 831 F.2d 1487, 1495 (9th Cir. 1987). Once an actual conflict is established, prejudice is presumed. *See id.*

First, Avalos-Barriga claims that Ronis simultaneously represented Avalos-Barriga in his case and his common law wife, Lopez-Juarez, in a different case brought in Texas. During the hearing, Ronis testified that the extent of his involvement in Lopez-Juarez's case was meeting with the lawyer in Texas who represented Lopez-Juarez and discussing the case. Tr. 58-59. According to Ronis, "Mr. Avalos was extremely concerned about her welfare." Tr. 58. Ronis did not make appearances on behalf of Lopez-Juarez, participate in strategizing, or receive any fees for representing Lopez-Juarez or referring Lopez-Juarez to the Texas lawyer. Because Avalos-Barriga's and Lopez-Juarez's cases were related, Ronis and the lawyer in Texas exchanged discovery documents and discussed the case. Tr. 61-64. Avalos-Barriga has failed to present any facts to refute the testimony of Ronis and demonstrate that a conflict of interest with regard to Lopez-Juarez existed.

Second, Avalos-Barriga contends that a conflict of interest existed with Michael Pancer, who represented co-defendant Reynoso-Gonzalez and who Avalos-Barriga believed was in partnership with Ronis. Pancer was associated with Reynoso-Gonzalez's representation as local counsel to assist Reynoso-Gonzalez's trial counsel, James Blancarte from Los Angeles. Tr. 12. For apparent financial reasons, Pancer never formally associated with the case and, in fact, Blancarte represented Reynoso-Gonzalez on the day of trial when Reynoso-Gonzalez pled guilty. Tr. 12, 14. Further, Ronis and Pancer were not law partners, nor did Ronis indicate to Avalos-Barriga that they were partners. Tr. 12-13. Other than a joint ownership interest in a building that Ronis and Pancer occupy, no conflict of

interest between the two existed. Tr. 12. In sum, Avalos-Barriga is unable to demonstrate any actual conflict of interest in Ronis's involvement with either Lopez-Juarez or Pancer.

III. Choice of counsel

Avalos-Barriga insists that he was deprived of counsel of his choice because he wanted to retain attorney Bernard G. Skomal but was prevented from doing so because of false and misleading statements made by Ronis. Specifically, Avalos-Barriga claims that Ronis told him that if he retained Skomal, he would be perceived as a cooperator because Skomal was essentially a "tool of the government." The Sixth Amendment grants a criminal defendant effective control over the conduct of his defense. *See United States v. Wheat,* 486 U.S. 153, 159 (1988). The essential aim of the amendment, however, is "to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Id.*

The crux of Avalos-Barriga's arguments centers on the alleged deceptive remarks by Ronis that Skomal worked for the government and, if Avalos-Barriga retained Skomal, he would be suspected as an informant of the government. Avalos-Barriga contends that his family understood these comments as a threat on their lives if Avalos-Barriga chose to retain Skomal. During the evidentiary hearing, Ronis explained that when he learned that Skomal had visited Avalos-Barriga to discuss representing him for the remainder of the case, he became

upset because Skomal had created problems in his relationships with other clients in other cases. Tr. 21. In a series of letters between Ronis and Skomal, it is abundantly clear that both attorneys understood that Skomal was meeting with Avalos-Barriga, Skomal had not formally taken the case, Ronis was not pleased with these meetings, and Ronis believed Skomal was providing reckless predictions to Avalos-Barriga. Ronis testified that he did not tell Avalos-Barriga that Skomal worked for the government. Tr. 22. Rather, Ronis explained:

> Mr. Avalos had told me that Mr. Skomal had told him that this was a relatively simple case, and that [Skomal] could get [Avalos-Barriga] a very good resolution, by that something under ten years, as he had in other cases.
>
> And I, in an effort to defend my own representation of him, I said, look, that very well may be correct that Mr. Skomal, if he has gotten those kinds of resolutions for other people in other cases, it is more than likely because he cooperated those clients. And that certainly is a way to reduce your sentence, if you like, but I don't want you to think that he is just going to walk in and get you something less than ten years without that.

Tr. 22. Avalos-Barriga explained to Ronis that he was unwilling to cooperate. Tr. 55. He failed to indicate to Ronis or the court, however, that he no longer desired Ronis to represent him.

In an affidavit provided after the evidentiary hearing, Skomal stated that in the middle of the trial, Avalos-Barriga called him "in a desperate state" to tell him that he wanted to accept the 20-year deal. Skomal telephoned

government counsel, who indicated that the 20-year offer was no longer available. At this time, neither Skomal nor Avalos-Barriga approached Ronis or the court to indicate Avalos-Barriga's unwillingness to proceed with Ronis for the remainder of trial.

Avalos-Barriga's choice of counsel guarantee cannot encompass a silent aspiration to change counsel. Avalos-Barriga did not terminate Ronis even though he was clearly aware of his choice to do so. Indeed, in Avalos-Barriga's sworn declaration, he explains that after the unfavorable jury verdict and four days before his sentencing, he gave Skomal a partial retainer to take over his case "after Ronis finished with me." Ronis represented Avalos-Barriga at sentencing and his representation was terminated one day later. Avalos-Barriga's belated assertion that he had wished to change counsel is insufficient to sustain a claim for denial of his choice of counsel.

CONCLUSION

After a comprehensive review of the papers filed in this matter and in light of the testimony presented during the evidentiary hearing, the Court rejects Avalos-Barriga's claims of ineffective assistance of counsel, conflict of interest, and denial of counsel of his choice. Avalos-Barriga's § 2255 petition is therefore DENIED. The Court grants Avalos-Barriga a certificate of appealability for the ineffective assistance of counsel claims that relate to trial errors only. The Court denies a certificate of appealability for all other claims discussed in this Order.

IT IS SO ORDERED.

Dated: July 5, 2000

/s/ Barry Ted Moskowit
HONORABLE
BARRY TED MOSKOWIT
United States
District Judge

cc: All counsel of record

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ENRIQUE AVALOS-BARRIGA, aka, Flaccco [sic]; Jose Bautista; Don Vincente; Don Chepe; El Medico; El Doctor; Juan Jose Robles, Defendant-Appellant.	No. 00-5699 D.C. No. CV-99-01686-BTM ORDER (Filed Dec. 21, 2001)

Before: B. FLETCHER, T.G. NELSON, and BERZON, Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing. Judge T.G. Nelson and Judge Berzon have voted to deny the petition for rehearing en banc and Judge B. Fletcher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

21 U.S.C. § 848. Continuing criminal enterprise

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if –

(1) such person is the principal administrator, organizer, or leader of the enterprises or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

CIV. NO. 99 CV 1686 BTM
CRIM. NO. 95 CR 973 BTM

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ENRIQUE AVALOS-BARRIGA,

Defendant.

TRIAL TRANSCRIPT

(October 9, 1996)

[913] THE SCENE OF THE CRIME OR UNKNOWINGLY OR UNINTENTIONALLY DID THINGS THAT WERE HELPFUL TO THE PRINCIPAL.

THE EVIDENCE MUST SHOW BEYOND A REASONABLE DOUBT THAT THE DEFENDANT ACTED WITH THE KNOWLEDGE AND INTENTION OF HELPING MEMBERS OF THE CONSPIRACY COMMIT THE IMPORTATION OR POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE.

THE GOVERNMENT IS NOT REQUIRED TO PROVE PRECISELY WHICH DEFENDANT ACTUALLY COMMITTED THE CRIME OR WHICH DEFENDANT AIDED AND ABETTED.

FOR THE CONSPIRACY CHARGE ALLEGED IN COUNT 1, THE GOVERNMENT IS NOT REQUIRED TO PROVE THAT THE AMOUNT OR QUANTITY WAS AS CHARGED IN THE INDICTMENT. IT NEED ONLY

PROVE BEYOND A REASONABLE DOUBT THAT THERE WAS A MEASURABLE AMOUNT.

THE DEFENDANT IS CHARGED IN COUNT 2 OF THE INDICTMENT WITH BEING A PRINCIPAL ADMINISTRATOR, ORGANIZER OR LEADER OF A CONTINUING CRIMINAL ENTERPRISE IN VIOLATION [sic] SECTION 848(B) OF TITLE 21 OF THE UNITED STATES CODE.

IN ORDER FOR THE DEFENDANT TO BE FOUND GUILTY OF THAT CHARGE, THE GOVERNMENT MUST PROVE EACH OF THE FOLLOWING ELEMENTS BEYOND A REASONABLE DOUBT:

FIRST, THE DEFENDANT COMMITTED A FELONY DRUG OFFENSE WHICH INVOLVED AT LEAST 150 KILOGRAMS OF COCAINE;

SECOND, THE OFFENSE WAS PART OF A CONTINUING SERIES OF THREE OR MORE OFFENSES COMMITTED BY THE DEFENDANT OVER A [914] DEFINITE PERIOD OF TIME;

THIRD, THAT THE DEFENDANT COMMITTED THE OFFENSES TOGETHER WITH FIVE OR MORE OTHER PERSONS;

FOURTH, THE DEFENDANT ACTED AS THE PRINCIPAL, ADMINISTRATOR, ORGANIZER OR LEADER OF THE FIVE OR MORE OTHER PERSONS;

FIFTH, THE DEFENDANT OBTAINED SUBSTANTIAL INCOME OR RESOURCES FROM THE VIOLATION.

THE GOVERNMENT DOES NOT HAVE TO PROVE THAT ALL FIVE OR MORE OF THE OTHER PERSONS OPERATED TOGETHER AT THE SAME TIME, NOR DOES THE GOVERNMENT HAVE TO PROVE THAT THE DEFENDANT WAS THE ONLY PRINCIPAL, ADMINISTRATOR, ORGANIZER OR LEADER OF THE ENTERPRISE.

THE GOVERNMENT NEED ONLY PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS ONE OF SEVERAL SUCH PRINCIPALS, ADMINISTRATORS, ORGANIZERS OR LEADERS.

IN REACHING A VERDICT ON COUNT 2 OF THE INDICTMENT, YOU MUST UNANIMOUSLY AGREE ON THE THREE OFFENSES CONSTITUTING THE SERIES OF VIOLATIONS OF THE FEDERAL NARCOTICS LAW AND YOU MUST UNANIMOUSLY AGREE ON AT LEAST FIVE OF THE PERSONS WHO THE DEFENDANT SUPERVISED OR MANAGED.

FINALLY, I INSTRUCT YOU THAT THE TERM "INCOME AND RESOURCES" MEANS THE RECEIPT OF MONEY OR PROPERTY.

WITH REGARD TO THE SECOND ELEMENT OF THE CONTINUING CRIMINAL ENTERPRISE CHARGED IN THE INDICTMENT, THE [915] REQUIREMENT THAT THE FELONY DRUG OFFENSE COMMITTED BY THE DEFENDANT WAS PART OF A CONTINUING SERIES OF THREE OR MORE OFFENSES COMMITTED BY THE DEFENDANT OVER A DEFINITE PERIOD OF TIME, ANY SERIES OF VIOLATIONS OF FEDERAL NARCOTICS LAWS WILL SUFFICE.

THUS, FOR EXAMPLE, ONE OF THE OFFENSES MAY BE POSSESSION WITH INTENT TO DISTRIBUTE, WHILE ANOTHER ONE OF THE OFFENSES MAY BE THE IMPORTATION OR THE ATTEMPTED IMPORTATION OF COCAINE.

IN YOUR CONSIDERATION WHETHER THE GOVERNMENT HAS PROVED A SERIES OF VIOLATIONS AS I HAVE DESCRIBED THEM, I ALSO INSTRUCT YOU THAT IT IS A FELONY VIOLATION OF THE NARCOTICS LAWS OF THE UNITED STATES TO KNOWINGLY OR INTENTIONALLY USE A TELEPHONE TO HELP BRING ABOUT ANY OF THE OFFENSES CHARGED IN COUNT 1 OF THE INDICTMENT.

I FURTHER INSTRUCT YOU THAT A SEPARATE FELONY OFFENSE IS COMMITTED EACH AND EVERY TIME A TELEPHONE IS USED IN THAT MANNER.

THE LAW DOES NOT COMPEL A DEFENDANT IN A CRIMINAL CASE THE [sic] TESTIFY. NO PRESUMPTION OF GUILT MAY BE RAISED AND NO INFERENCE OF ANY KIND MAY BE DRAWN FROM THE FACT THAT THE DEFENDANT DID NOT TESTIFY.

WHEN YOU RETIRE, YOU SHOULD ELECT ONE OF YOUR MEMBERS OF THE JURY AS YOUR FOREPERSON. THAT PERSON WILL PRESIDE OVER YOUR DELIBERATIONS AND SPEAK FOR YOU HERE IN

* * *